Now, there is no doubt that the proper residence of the family is the father's house in Jedburgh. If, however, there were any averments in the answers for the wife of facts to justify her in leaving her husband, the case would have been different, but while there is a general averment that the petitioner was cruel to her, no specific instance of cruelty which would justify us sending the case to proof is averred. I therefore regard the answers as containing no relevant statement of grounds justifying the wife in leaving her husband, and as disclosing no reason why she should not return to him to-morrow bringing the child with her. I adhere to the opinion I expressed in *MacKellar's* case that the welfare of the child is the primary consideration for the Court, but I think that, young as the child is, it is better that it should be restored to the father, than that at the present stage we should give the custody to the mother without any reason set forth. She says, no doubt, that she is going to raise an action of separation against her husband, but these answers were lodged so long ago as 21st July, and no steps have been taken to bring the action into Court. On the facts as disclosed in the petition and answers I think no reason is given for the wife leaving her husband, and that we should grant the petition.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent

The respondent having moved for her expenses, the motion was opposed by the petitioner.

The Court granted the first alternative of the prayer of the petition, and found the respondent entitled to expenses.

Counsel for the Petitioner—A. S. D. Thomson. Agent — J. Murray Lawson, S.S.C.

Counsel for the Respondent—G. Watt. Agents—Winchester & Nicolson, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRICHTON AND ANOTHER *v.* FERGUSON AND OTHERS (HENDERSON'S TRUSTEES).

Expenses—Trustee.

Circumstances in which testamentary trustees who in an action of reduction had unsuccessfully defended the trust-disposition and settlement by which they were appointed, *held* entitled to their expenses out of the trust-estate.

Process—Jury Trial—Issue.

Form of issue in an action of reduction of a trust-disposition on the ground of fraud and circumvention *commented on per* Lord President Robertson.

Mrs Crichton and another raised an action to reduce the trust-disposition and settlement with relative codicils of the late Anne Henderson, Linlithgow, whose next-of-kin the pursuers were.

The pursuers called the Rev. John Ferguson, minister of Linlithgow, James Nimmo Cuddie, John George Barron Henderson, and Michael William Henderson, Miss Henderson's trustees and executors, as defenders. They also called the beneficiaries under Miss Henderson's trust-disposition "for their right and interest in the premises." None of the beneficiaries, however, compeared.

The conclusion of the summons for expenses craved that the Rev. John Ferguson and the other trustees "as trustees foresaid" should be decerned and ordained to make payment to the pursuers of the sum of £100 sterling or such other sum, &c.

The pursuers averred that the testatrix "was very facile and easily influenced. She was absolutely under the influence of William Horn Henderson, of the firm of Glen & Henderson, writers, Linlithgow, and the members of his family. Mr Henderson was not a blood relation, but he managed her affairs and directed her with reference to the disposal of her means and estate after her death." They further averred that the testatrix "was weak and facile in mind and easily imposed upon, and the said William Horn Henderson and members of his family, taking advantage of the said weakness and facility, did, by fraud and circumvention, obtain the said deed and codicils to the lesion of the said Anne Henderson and of the pursuers." There was no averment on record of fraud against the trustees.

The pursuer pleaded—"(2) The said Anne Henderson, when she executed the said pretended trust-disposition and settlement and codicils, having been weak and facile in mind, and easily imposed upon, and the said William Horn Henderson having taken advantage thereof to procure the same to the lesion of the granter, the same ought to be reduced. (3) The said settlement and codicils having been impetrated from the said Anne Henderson by undue influence on the part of the said William Horn Henderson, the same ought to be set aside."

The following issue was allowed by the Lord Ordinary (KYLLACHY):—"Whether on or about the foresaid date [viz., the date of the trust-disposition] the said Anne Henderson was weak and facile in mind and easily imposed upon; and whether William Horn Henderson or any of the defenders, taking advantage of her said weakness and facility, did, by fraud or circumvention, obtain the said deed to the lesion of the said Anne Henderson?" Issues in identical terms were allowed with regard to the codicils.

The jury having at the trial (at which the Lord President presided) returned a verdict for the pursuers on all the issues, the pursuers moved to apply the verdict, and intimated that they desired the defenders to be found liable in expenses only *qua* trustees and not personally.

The defenders moved that they should be found entitled to their expenses out of the trust-estate. They argued—The present case fell within the principle of *Ross* v. *Macpherson* May 25, 1898, 35 S.L.R. 699, 25 R. 897. The general rule was that trustees were entitled to defend a will if they had a reasonable case. [LORD M'LAREN expressed dissent from this proposition and asked—Are trustees entitled to any indulgence different from that given to private individuals?] Here, though nothing was alleged against the defenders on record, the issue was a direct attack upon their character, and they were entitled to defend the action —*Munro* v. *Strain*, June 18, 1874, 1 R. 1039. The case was distinguishable on that ground from *Graham* v. *Marshall*, November 22, 1860, 23 D. 41.

The pursners argued that the defenders were not entitled to be indemnified out of the trust-estate, and referred to *Graham*, *ut sup.* There was no general rule by which trustees who unsuccessfully defended a deed were entitled to expenses out of the trust-estate. It was a question of circumstances — *Watson* v. *Watson's Trustees*, January 20, 1875, 2 R. 344. There were here no allegations of fraud on the part of the trustees on record, which distinguished the present case from the very special one of *Ross*, *ut sup.*

LORD PRESIDENT—I am for deciding this question of expenses on the very exceptional circumstances of the case.

The issue of facility and circumvention which, owing to there being so many deeds, is repeated five times, puts the question whether this alleged testatrix was weak and facile in mind, and whether Mr William Horn Henderson, writer, Linlithgow, or any of the defenders, did by fraud and circumvention obtain the will. I must confess I think that form of issue, even apart from the record, is open to the grave objection that a charge of fraud and circumvention ought specifically to apply to individuals, and it appears to me most objectionable that without even asking the jury to single out any particular individual, they should be entitled to launch a verdict, as they have done here, against a set of people without saying which of them the verdict is aimed at.

But that peculiarity of the case derives special importance from a comparison of the issue with the record. The word defenders is so applied by the summons solely to the trustees. If we turn to the record we find that there is no charge of fraud against the trustees at all, the charge of fraud is against Mr William Horn Henderson and members of his family, some of the family being "defenders" and some not.

After the adjustment of the issue this singular result follows, that the trustees who are not charged with fraud at all in the record are put into the issue along with Mr William Horn Henderson without any attempt to distinguish which of them had to do with the matter. I mention this because I think that such issues as these should not be used. But then this bears very directly on the question of expenses. The real truth is that the issue should not have been allowed at all, because there is no record to support it, but from the moment it was allowed the trustees were bound, being persons with characters to lose—(one of them the minister of the parish)—to go on and defend themselves, and we cannot say whether they have done so successfully or not. But in the present question they are quite entitled to say that they have, and Mr Watt and his clients, owing to their own fault, have not the means of gainsaying this contention of innocence. The logical result is that from the lodging of the issues the trustees are entitled to their expenses, but I am inclined to think that we must assume that the record justified the issues, and that the trustees were entitled to come forward from the first and defend themselves. Then again, Mr Watt makes no motion for expenses against the trustees. The reason of this, it is said, is that there is no conclusion for expenses against the trustees in the summons. I say that that proves conclusively that he had knowledge of their innocence from the first.

On these grounds I am for allowing the trustees their expenses, but I think it right to say that this case does not involve any finding generally to the effect that trustees who are not charged with fraud are entitled to try the case at the expense of the trust-estate, and should not rather go to the beneficiaries and say that they could not defend unless they were kept clear of expenses. I do not wish to say anything against that principle, which seems to apply to many cases, but I am decidedly of opinion that it does not apply to this.

LORD M'LAREN—I agree with your Lordship in the chair as to the disposal of the question of expenses in the special circumstances of the case; and I also desire to reserve my opinion upon the more general question raised in the argument, which we are not called upon to decide. If a will is unsuccessfully defended by beneficiaries claiming under it, those beneficiaries would be liable in expenses upon the general ground that the pursuer is entitled to be indemnified for the costs which he has incurred in vindicating his rights, and I do not see why a pursuer is to lose his expenses because the defenders put forward parties to contest his right in their interest. Accordingly it is only, as it seems to me, by reason of some peculiarity in the case that trustees can be entitled to receive their expenses if unsuccessful. In the present case the beneficiaries were not even called as proper defenders but only as parties for their interest. The pursuer of the action has not taken the means open to him of compelling them to come into court, but has chosen to raise his action against the trustees, and has put the trustees into the position of being subjected to a general charge of fraud and circumvention. I think the pursuer in the circumstances cannot complain that the trustees came forward and defended the action.

Lord Kinnear—I agree. I do not think it is necessary to lay down any general rule as to the conditions on which trustees who have made an unsuccessful defence of a will may be allowed their expenses out of the estate of the deceased testator whose act has put them into a position to consider whether they are to defend the will or not. The present is a very exceptional case, and for the reasons stated by your Lordship, I think that in this particular case the trustees should have their expenses. But upon the more general question I should desire to reserve my opinion.

Lord Adam was absent.

The Court found the pursuers entitled to their expenses out of the trust-estate, and also found the defenders entitled to their expenses out of the trust-estate.

Counsel for the Pursuers—Watt—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defenders—W. Campbell, Q.C.—Constable. Agent—Thomas Liddle, S.S.C.

Tuesday, November 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DUNLOP *v.* MAXTON.

Reparation — Road — Defective Condition of Pavement — Liability of Proprietor where Defect Due to Operations of Railway Company under Statutory Powers.

The Glasgow Central Railway Act 1888 authorised the Caledonian Railway Company to construct an underground railway through Glasgow. Section 39 empowered the Railway Company to break or open any street or footpath in the streets under which the line was being constructed. Section 41 (*c*) provided that they should, to the satisfaction of the Corporation of Glasgow, restore the roads and pavements interfered with by them to the original level, and cause them to be maintained till properly consolidated.

A person was injured by stumbling and falling on account of the defective condition of a pavement which had been interfered with by the Railway Company in virtue of their powers under the Act, and which had been allowed to remain in a dangerous condition for two years. The Corporation had taken no steps to enforce the obligation of the Railway Company, but the proprietor of the adjoining property, and of the pavement and street *ad medium filum*, had frequently applied to the company to restore the pavement, and had obtained from them an undertaking to do so prior to the accident.

In an action brought by the person injured against the proprietor, *held* that the latter was not bound to restore the pavement in so far as injured by the operations of the Railway Company, and was not liable for the injuries sustained by the pursuer.

Baillie v. *Shearer's Judicial Factor*, Feb. 12, 1894, 21 R. 498, *distinguished.*

The Glasgow Central Railway Act 1888 (51 and 52 Vict. c. 194) authorised the Caledonian Railway Company to construct an underground railway through Glasgow. Section 39 of the Act provided that the Railway Company might, for the purposes of constructing the railway, temporarily cross, alter, break open, stop up, or divert any streets, roads, lanes, and footpaths shown on the deposited plans and described in the deposited book of reference, and "may also during such construction from time to time break or open any such streets, roads, lanes, or footpaths when necessary for the protection or repair of any sewers, drains, or pipes under the same." Section 40 provided that the company should restore the portions of the carriageway and footway of any street, road, lane, or footpath which might be from time to time stopped up by them for traffic for the purposes of the works within three months from the day upon which such portions should be stopped up, under a penalty not exceeding ten pounds for every day after the expiration of the said period. Section 41, sub-sec. (*c*), provided that "In every case in which the company interfere with any street, road, lane, pavement, footpath, or tramway, the company shall, to the satisfaction of the Corporation" of Glasgow, "(1) Restore the street, road, lane, pavement, footpath, or tramway so interfered with by the said works or by subsidence occasioned thereby to the original level; (2) cause the street, road, lane, pavement, or footpath to be maintained and properly consolidated; (3) make good the paving and metalling of the street, road, lane, pavement, or footpath to be repaved or remetalled over their entire width."

In the autumn of 1891 the Railway Company, in virtue of the powers conferred on them by the Act, began to make alterations in the gas and water pipes in the roadway and under the pavement opposite No. 721 Great Western Road, occupied by Messrs Chrystal, Bell, & Company, and owned by John Maxton. The Great Western Road is a public street vested by the Glasgow Police Act in the Corporation of Glasgow in their capacity of Board of Police. As the result of the Railway Company's operations the pavement got into an unsafe condition, the level of the flags being altered, and other damage was done to the property adjoining. In letters to the Railway Company, commencing in 1892 and continuing after the operations of the Railway Company had been completed, and in personal interviews with the Railway Company officials, Mr Maxton, who owned the line of tenements of shops and dwelling-houses forming Nos. 711 to 729 Great Western Road, repeatedly called upon the Railway Company to remedy the damage caused by their operations, and, *inter alia*, to restore the pavement in question. The